SUPREME COURT, U. S.

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FILED
DEC 10 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-565

HAROLD A. BREIER,

Petitioner,

against,

ALLEN BENCE, et al.,

Respondents.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 7TH CIRCUIT

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Respondents submit to this Honorable Court this reply respectfully requesting that the Supreme Court deny Petitioner's Petition for Writ of Certiorari.

Petitioner prays that a Writ of Certiorari issue to review the order or judgment herein of the U.S. Court of Appeals for the 7th Circuit entered in the above entitled action on August 14, 1974.

OPINION BELOW

The opinion reported at 501 F. 2d 1185, (1974) affirms the District Court: Rule 44, Sec. 8 of the Milwaukee Police Department,

> "Conduct unbecoming a member and detrimental to the service,"

is unconstitutionally vague.

QUESTION PRESENTED BY PETITIONER

Is Rule 44, Sec. 8 of the Milwaukee Police Department unconstitutionally vague on its face?

RULE OR REGULATION INVOLVED

The regulation or rule involved is Rule 44, Sec. 8 of the Milwaukee Police Department. Said rule reads:

Any member of the Department may be dismissed from the service or suffer such other punishment as the Chief of Police may direct when charged with and when any of the the following offenses are substantiated:

Commission of a felony or misdemeanor under any law or ordinance whatever
Intoxication
Cowardice
Habitual indulgence in narcotic drug
Insubordination or disrespect toward a superior officer
Overbearing, oppressive, or tyrannical conduct in discharge of duty
Neglect of duty
Neglect or disobedience of any order
Absent from duty without leave
Immorality
Conduct unbecoming an officer and detrimental to the service
General inefficiency and incompentency
Incapacity for duty, either mental, physical or educational
Breach of discipline
Neglect or refusal to pay just debts
Communication information relating to police work without permission
Making a false official statement
Willfull maltreatment of a prisoner
Discourtesy or insolence
Untruthfulness
Sleeping while on duty

Uncleanliness in person or dress
Smoking while in uniform
Accepting bribe
Keeping fee, gift or reward
Criticizing department orders
Aiding persons to escape arrest
Refusing to give number of badge when requested
Neglecting to give receipt for property taken from prisoners
Failure to report any member violating rules or orders of department
Failure to report known violations of law or ordinances
Any other act or omission contrary to good order and discipline, or constituting a violation of any provisions of the Rules and Regulations of the Department, or any department order.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Respondents, Allen Bence, et al., a police officer and police union representative, was disciplined by the Petitioner for writing a letter to the City of Milwaukee Labor Negotiator and for posting copies of said letter on police union bulletin boards at various police district stations; said bulletin boards being provided wth the express consent of Petitioner Chief of Police, and for the purpose of disseminating police union information to police union members. Said letter contained inaccuracies as to employe treatment and no formal attempt was made by the Respondent to verify the allegations contained therein prior to its mailing. The Respondents received official reprimands from the Petitioner: "conduct unbecoming". Respondents challenged the action of Petitioner in the District Court attacking the constitutionality of the rule on the grounds of vagueness and overbreadth, both facially and as applied. On May 7, 1973, the District Court held the rule to be unconstitutionally vague on its face and decreed that the rule was not overbroad. The rule's application was not considered by the District Court. Petitioner appealed the ruling. The 7th Circuit Court of Appeals affirmed the order. All judges of the 7th Circuit Court of Appeals concurred that the rule was unconstitutional as applied.

Respondents respectfully set forth additional facts concerning this case.

REASONS FOR DENYING THE WRIT

I. The decision of the 7th Circuit Court of Appeals is not in direct conflict with *Jacob J. Parker, Warden, et al. vs. Howard B. Levy*, — U.S. —, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974); *Arnett vs. Kennedy*, — U.S. —, 94 S. Ct. —, 40 L. Ed. 2d 15, in that said decisions are at minimum distinguishable on the facts. The thrust, scope and intent of the decisions by this Honorable Court are in no way, Respondents respectfully submit, controverted or ignored by the decision of the 7th Circuit Court of Appeals.

Under *Parker, supra,* and *Arnett, supra,* this Honorable Court set forth specific criteria for testing the rules therein challenged. This Court spoke in the context of the factual situation presented therein and specifically in *Parker, supra,* this Honorable Court was faced with a military regulation where said rule was part and parcel of a standard under the Uniform Code of Military Justice.

Petitioner states, (at Page 4) that "The rule at issue in *Parker* was 'conduct unbecoming an officer and a gentleman.'" The instant challenge is most certainly distinguishable and the rule of the Milwaukee Police Department is, in fact, not synonymous but merely analogous to the *Parker* rule.

Petitioner alleges that the 7th Circuit Court of Appeals contradicted itself in *Muller vs. Conlisk,* 429 F. 2d (7th Cir., 1970), at Page 904. The *Muller, supra,* decision and the decision of the 7th Circuit Court in the instant case are precisely the same and precisely the same rule was made by the Court.

Although there may be some semantic differences and possibly a departure from strict Aristotilian logic in the 7th Circuit Court of Appeals decisions there is by no means any fallacious reasoning which should compel this Honorable Court to exercise its sound discretion to grant Petitioner's Writ of Certiorari. "Precision of regulations must be the touchstone in an area so closely touching our most precious freedoms." *NAACP vs. Button,* 371 U.S. 415, 448, 43 Supreme Court 328, 340, 9 L. Ed. 2d 405, (1963).

Petitioner sets forth "that the thrust and application of *Arnett, supra,* and *Parker, supra,* taken together have been cleverly but not properly skirted by the 7th Circuit by analyzing the cases individually and in failing to apply the principles found therein in tandem." Respondents do not find the confusion in analyzing *Arnett, supra,* and *Parker, supra,* as construed by the 7th Circuit Court of Appeals. Any variance is harmless, and not a variance of any proportion which would compel this Honorable Court to accept jurisdiction in this matter. It is incongruous that the Petition for Writ of Certiorari is predicated upon the dissent in the 7th Circuit Court of Appeals that the proper test was not applied. The test set forth in *Arnett, supra,* and *Parker, supra,* is most explicit and, therefore, this Honorable Court need not speak further; particularly when the 7th Circuit Court of Appeals has ruled that the application of the facts in the instant case constitutes their reasoning and analysis and thereby their decision.

II. The decision of the 7th Circuit Court of Appeals is not in conflict with the decisions of other Circuits.

Respondents find no controversy between the 7th Circuit and other circuits.

In *Allen vs. City of Greensboro,* 452 F. 2d 489 (1971), the Court was faced with the question of whether or not the police detective was given notice of the charges. The facts in that case are most easily understood when applied to that question.

Petitioner contends that "prior to the 7th Circuit Court of Appeals' opinion in the case at bar, there was no such conflict and no need for hope or expectation to successfully challenge the many forms of the 'catchall' phrase 'conduct unbecoming' utilized by countless police departments and governmental administrative agencies." However, prior to *Arnett, supra,* and *Parker, supra,* there was controversy in many circuits over the test to be applied and the questions therein presented. It would appear that Petitioner requests this Honorable Court to speak further than the decisions rendered in *Parker, supra,* and *Arnett, supra.* Respondents contend that this Honorable Court in *Parker, supra,* and *Arnett, supra,* has established sufficient clarity and this Honorable Court's elucidation should be sufficient for all circuits when presented with similar questions.

The Supreme Court in *Parker, supra,* and *Arnett, supra,* taken with earlier decisions, has set forth sufficient language and analysis to settle the matter. The 7th Circuit Court of Appeals in the instant case has seen fit to distinguish this case from *Arnett, supra,* and *Parker, supra,* and further, in any event, the 7th Circuit Court of

Appeals has stated that the rule was unconstitutionally applied.

III. No adverse impact on police departments or other administrative agencies can be reasonably anticipated in light of the 7th Circuit Court of Appeals' decision.

The Supreme Court has outlined sufficient criteria and standards for any police department or administrative agency to properly apply the *Arnett, supra,* and *Parker, supra,* decisions. It is settled constitutional precepts that the opinions of the United States Supreme Court constitute the law of the land, notwithstanding any opinions of lower courts. There is no controversy when the facts and decision of the 7th Circuit Court of Appeals are analyzed in light of this Honorable Court's rulings in *Parker, supra,* and *Arnett, supra.*

IV. The decision of the 7th Circuit is not in conflict with another decision of the same Circuit.

Respondents contend no conflict exists and that both cases are quite easily distinguished on the facts and particularly the Court of Appeals distinguished the cases factually and the questions of law decided in both cases are drastically different. In *Simcox vs. Board of Education of Lockport Tp., Will Co., Ill.,* 443 F. 2d 40 (7th Cir., 1971) the teacher was confronted with a rule and the Court decided whether the Board of Education acted in good faith and that it fairly exercised its discretion. Petitioner contends that the holding of the 7th Circuit Court of Appeals limits and constrains the discretion of the Chief of Police and other administrators of adminis-

trative agencies in the application of the "catchall" rules and regulations. Respondents contend that while "catchall" phrases have some redeeming qualities, such phrases must be construed and applied to the situation therein presented. The analogous thrust set forth by Petitioner controvenes accepted standards and criteria and attempts to permeate the holdings of this Honorable Court in *Parker, supra,* and *Arnett, supra,* with the application of the 7th Circuit Court of Appeals decision in the instant case and further said Petitioner's application for a Writ of Certiorari is predicated upon a controversy which in Respondents' analysis does not exist. This Honorable Court has spoken and no further elucidation should be necessary. The *Bence* case is distinguishable and the *Bence* Court properly construed the facts and applied the applicable law and, therefore, Respondents respectfully pray that this Honorable Court deny said Petition for Writ of Certiorari.

Respectfully submitted,

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